80-912

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS EDWARD SISK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CECIL D. BRANSTETTER
CARROL D. KILGORE
BRANSTETTER, KILGORE & STRANCH
200 Church Street, 4th Floor
Nashville, Tennessee 37201
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

In a prosecution for "RICO" felonies under the theory that the Office of the Governor of a State is an "enterprise" capable of being conducted through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962—

1. Does the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States bar petitioner's re-trial following a *sua sponte* declaration of mistrial over the objection of petitioner and all other defendants where—

(a) The ground for declaration of mistrial, sustained as adequate by the intermediate appellate court, was possible contamination of four jurors by publicity regarding the anonymous solicitation of a jury-tampering bribe made to petitioner and promptly reported to the Court.

(b) Though there were five seated alternate jurors, neither of the courts below considered whether the District Court's ability to excuse the suspect jurors and to seat four of the alternates rendered the mistrial declaration manifestly unnecessary.

(c) The District Court considered excusing some jurors an adequate remedy for the possible publicity taint—after *voir diring* all jurors and alternates, the Court ordered the case set for early resumption of trial with the comment that some jurors would probably be excused.

(d) In additional colloquy upon call for resumption of trial, the government indicated that mistrial would be preferable to completing the trial only to find any conviction tainted by reversable error, the possible "reversable error" being held by the Court of Appeals not to constitute ground for a mistrial.

2. Under the holdings of *Illinois* v. *Somerville,* 410 U.S. 458 and *Lee* v. *United States,* 432 U.S. 23, that the Double Jeopardy

Clause does not prevent retrial upon a new indictment following an aborted trial based upon an invalid indictment, when the Court of Appeals determined herein that retrial was not barred—

(a) Whether the Court had jurisdiction, in the review of the Double Jeopardy issues alone, to consider Petitioner's statutory construction arguments that the indictment was invalid on its face because the Office of Governor of Tennessee cannot be an enterprise under Title IX of the Organized Crime Control Act, 18 U.S.C. §§ 1961-1968.

(b) If it had such jurisdiction, whether the Court of Appeals should have considered the question of the validity of the indictment in view of the policies underlying the Double Jeopardy Clause, as enunciated in *United States* v. *Jorn,* 400 U.S. 470 and *United States* v. *Dinitz,* 424 U.S. 600.

(c) Whether it is possible for the Office of Governor of a State to be an "enterprise" within 18 U.S.C. §§ 1961-1968.*

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* Co-defendants Charles Benson, Jr., and Charles Frederick "Fred" Taylor will file their separate Petition for Certiorari. Other co-defendants were William Aubrey Thompson and Dale Quillen, who was not a party to the appellate proceedings below.

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OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals (Appendix, pp. A-1 -A-13) has been reported at 629 F.2d 1174 and the orders of the District Court (Appendix, pp. A-21 - A-26) have not been reported.

JURISDICTIONAL GROUNDS

(i) The judgment of the Court of Appeals sought to be reviewed was entered on September 18, 1980.

(ii) The order denying petitioner's and others' petitions for rehearing was entered October 7, 1980.

(iii) 28 U.S.C. § 1254(1) confers on this Court jurisdiction to review the said judgment by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes, reprinted in the Appendix due to their collective length, are Amendment V to the Constitution of the United States, and Title IX of the Organized Crime Control Act, 18 U.S.C. §§ 1961-1968. (Appendix pp. A-28 - A-40)

STATEMENT OF THE CASE

The jurisdiction of the U.S. District Court for the Middle District of Tennessee was based upon an indictment charging Petitioner, formerly Legal Counsel to the Governor of Tennessee, and others with violating 18 U.S.C. § 1962. It was the theory of the indictment that the Office of Governor was an "enterprise" which the defendants conducted through a pattern of racketeering activity by selling pardons, commutations, and delays in the issuance of extradition warrants.

After unsuccessful defensive motions to dismiss the indictment upon the statutory construction ground that the Office of Governor could not be an enterprise under the statute, the trial commenced. Mid-point in the government's case, after three weeks' receipt of evidence, trial was recessed due to the illness of the presiding judge.

During the four-week recess which followed, the judge reported himself incapable of continuing with the trial, a substitute judge was designated to complete the trial and he conducted a *voir dire* examination of the jury and the six alternate jurors initially impaneled.

The Court's *voir dire* concentrated not only upon the jurors' capacity to remember but also whether any of them might be embarassed by publicity given to Petitioner's receipt of a jury-tampering bribery solicitation and the resulting investigation thereof by an Assistant Director of the F.B.I. At the conclusion of *voir dire,* the Judge ordered the trial to be resumed on the

first day of the fifth week after recess, subject to his completion of reading the transcript and his probable dismissal of at least one of the four jurors to whom third parties had made comments about the jury tampering publicity.

When the case was called for re-commencement of the trial as scheduled, the Judge was deeply concerned about an emergency charge given by his predecessor on the last trial date before he was stricken, and sought expression of the parties' desires. Petitioner and all other defendants opposed mistrial. The Government stated its opposition thereto but further stated that if the emergency charge were reversible error, a mistrial would be preferable to the course continuing to conviction, only to have an appellate court reverse for re-trial. The Court thereupon ordered a mistrial, discharged the jury, and subsequently entered its written mistrial order upon three grounds—his predecessor's emergency charge, jury tampering solicitation publicity effects and the effect of the lengthy recess upon the memories of jurors.

Petitioner moved dismissal on the ground that re-trial was barred by the Double Jeopardy Clause of the Fifth Amendment, and appealed from the Court's order overruling his motion.

The Court of Appeals held that the District Court had not found mistrial manifestly necessary due to the length of the recess; it held that the possible error in the original Judge's emergency charge was not reviewable by his successor and was not grounds for mistrial. But it affirmed the mistrial order upon the ground of possible effects of publicity upon four jurors.

By Petition for Rehearing, Petitioner asked the Court to reconsider whether mistrial was manifestly necessary in view of the available alternative of excusing the four jurors and replacing them from the five remaining alternates, but rehearing was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals failed to explore whether the presence of a wholly adequate alternative prevented the declaration of mistrial from being manifestly necessary so as to raise the Double Jeopardy Clause's bar against retrial. Such holding is contrary to decisions of other courts of appeals which have explored the possible alternatives to mistrial and, when found adequate, have held retrial barred by the Double Jeopardy prohibition. *Harris* v. *Young,* 607 F.2d 1081 (CA 4 1979), *United States* v. *Pierce,* 593 F2d 415 (CA 1 1979), *United States* v. *McKoy,* 591 F2d 218 (CA 3 1979), *Mizzell* v. *Attorney General of New York,* 586 F2d 942 (CA 2 1978), cert denied 440 U.S. 967, *Dunkerley* v. *Hogan,* 579 F.2d 141 (CA 2 1978), cert denied 439 U.S. 1090, *United States* v. *Starling,* 571 F.2d 934 (CA 5 1978), *United States* v. *Tinney,* 473 F.2d 1085 (CA3), cert denied 412 U.S. 928, and *United States ex rel. Russo* v. *Superior Court of New Jersey,* 483 F.2d 7 (CA 3 1973), cert denied 414 U.S. 1023.

This case and the questions it raises present an appropriate vehicle for this Court to furnish needed guidance for resolution of policy conflicts which have been the subject of learned comment[1] —the policy favoring the governmental right to completion of a trial to protect the ends of public justice, with the corollary requirement that great deference be shown to the trial judge's judgment, *Illinois* v. *Somerville,* 410 U.S. 458, versus the interest of the defendant in retaining "primary control" over whether mistrial shall be declared or the trial continued, *United States* v. *Dinitz,* 424 U.S. 600, 609, before the same tribunal, *United States* v. *Jorn,* 400 U.S. 470, in light of the expense and strain of criminal trial and the defendant's own judgment as to whether that desired tribunal has been swayed in his favor by prosecutorial defects not to be repeated upon mistrial.

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[1]Including a lengthy treatment of the issue by Schulhofer, "Jeopardy and Mistrials," 125 *U. of Penn. L. Rev.* 449-539 (1977).

Considering the historical source of the doctrine of "manifest necessity," *United States* v. *Perez,* 9 Wheat. 579, 580, or "evident necessity," 4 Blackstone, Commentaries * 360-380 the questions raise the issue of whether its application should be and perhaps is more restrictive than the popular view of its present scope; and whether it has more than minimal application to cases in which an appellate court is no less competent than a trial court to determine the mistrial's necessity because of the presence of obvious alternatives to mistrial.

This Court's further and more explicit guidance upon these aspects of Double Jeopardy doctrine would be of great value not merely to defendant but in the interests of attaining public justice in that it could diminish the number of *sua sponte* mistrials by encouraging trial judges always to seek practical alternatives.

The second question presented by Petitioner is also one which has not been answered but should be answered by this Court. Considering the underlying Double Jeopardy Policies designed to protect the rights of a defendant, and the fact that the Double Jeopardy Clause does not prevent retrial when a mistrial is declared because the indictment is void, *Illinois* v. *Somerville,* 410 U.S. 458, *Lee* v. *United States,* 432 U.S. 23, if an appellate court determines that a Double Jeopardy plea is without merit no reason is preceived why the court should not uphold Double Jeopardy policies by also declaring the indictment invalid as not charging an offense. Under *Somerville* and *Lee* appellate courts remain free to consider validity of the indictment when such will prejudice a defendant but under the holding of the Court of Appeals in the instant case, the same issue cannot be considered in a defendant's behalf in a Double Jeopardy case when its consideration could well bar retrial.

The Government has seized upon the "enterprise" concept in Title IX of the Organized Crime Control Act, 18 U.S.C. §§ 1961-1968, to police the mode in which officials of State and

Local Governments discharge their official duties despite the questionable constitutional basis of Congressional use of the commerce power for this purpose, *National League of Cities* v. *Usery,* 426 U.S. 833, 854-855 and in this attempt, the Government has been supported by decisions of Courts of Appeals.[2] Recently, however, conflicting decisions of other Courts of Appeals have more carefully construed the term in light of the cannons of statutory construction and the legislative history, *United States* v. *Sutton,* 605 F.2d 260 (CA6 1979) *vacated and hearing en banc granted* April 2, 1980, *United States* v. *Anderson,* 629 F.2d 161 (CA8 1980), *United States* v. *Turkette,* _____ F.2d _____ (CA1, Nos. 79-1545, 79-1546, September 23, 1980).

It is of great public importance when the Federal Government uses its criminal prosecution powers, based upon the Commerce Clause, to directly attack corruption in State Government. With a conflict among the Circuits as to whether the term "enter-

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[2] *United States* v. *Grzywacz,* 603 F.2d 282 (CA7 1979), cert denied _____ U.S. _____, 64 L.Ed.2d 788; *United States* v. *Frumento,* 563 F.2d 1083 (CA3 1977), cert denied 434 U.S. 1072; and *United States* v. *Brown,* 555 F.2d 407 (CA5 1977), cert denied 435 U.S. 904. Other cases, not involving charges that a Governmental entity constituted an enterprise, in their broad approach are contrary to the rationale of *United States* v. *Sutton, United States* v. *Anderson,* and *United States* v. *Turkette, supra, United States* v. *Parness,* 503 F.2d 430 (CA2 1974), cert denied 419 U.S. 1105; *United States* v. *Cappetto,* 502 F.2d 1351 (CA7 1974); *United States* v. *Aleman,* 609 F.2d 298 (CA7 1979), cert denied _____ U.S. _____, 63 L.Ed2d 780; *United States* v. *Rone,* 598 F.2d 564 (CA9 1979), cert denied _____ U.S. _____, 63 L.Ed2d 780; *United States* v. *Elliott,* 571 F.2d 880 (CA5 1978), cert denied 439 U.S. 953; *United States* v. *Swiderski,* 593 F.2d 1246 (CADC 1978), cert denied 441 U.S. 933; *United States* v. *Forsythe,* 560 F.2d 1127 (CA3 1977); *United States* v. *Mclaurin,* 557 F.2d 1064 (CA5 1977), cert denied 434 U.S. 1020; *United States* v. *Altese,* 542 F.2d 104 (CA2 1976), cert denied 429 U.S. 1039; *United States* v. *Hawes,* 529 F.2d 472 (CA5 1976); and *United States* v. *Morris,* 532 F.2d 436 (CA5 1976).

prise" should be broadly or strictly construed, with its application to the Government of a State producing internal inconsistency in useage of the term in the Act and with the legislative history containing no language to support use of the term as an equivalent to the Government of a State but multiple uses of such terms as "business" as a synonym for "enterprise", the issue of the correct meaning of such term is ripe for decision by this Court.

Such early decision would be in the public interest and this would be an appropriate case for its rendition—the defensive pleadings in this case establish that the United States Attorney intervened in local government to persuade a Governor Elect to take office before the scheduled time in order to terminate the term of the sitting Governor for the purpose of preventing him from granting any additional pardons. ("Defendant Sisk's Motion re: Conduct of Government Representatives" filed April 30, 1979.)

WHEREFORE, Petitioner respectfully prays issuance of the Writ of Certiorari and this Court's review of the issues herein suggested.

Respectfully submitted,

BRANSTETTER, KILGORE
& STRANCH

CECIL D. BRANSTETTER

CARROL D. KILGORE
200 Church Street
Nashville, Tennessee 37201

Attorneys for Petitioner

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APPENDIX A

No. 79-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Thomas Edward Sisk, Charles Benson, Jr., Charles Frederick "Fred" Taylor, and William Aubrey Thompson,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed September 18, 1980.

Before: LIVELY and MARTIN, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This case comes before us as the last link in an improbable chain of events. Two questions are presented: first, whether there was "manifest necessity" for the

district court's *sua sponte* declaration of a mistrial, so that retrial of appellants was not barred by the Double Jeopardy Clause of the Fifth Amendment; second, whether a government entity can be an "enterprise" within the scope of the "Racketeer Influenced and Corrupt Organizations" ["RICO"] chapter of the Organized Crime Control Act.[1] We hold that the facts of this case demonstrate the "manifest necessity" of the district court's declaration of mistrial; there was therefore no error in the district court's denial of appellants' motion to dismiss the indictment on double jeopardy grounds. We do not reach the second question, for we lack jurisdiction to consider it.

I

Each of the appellants in this case was in some way connected with the government of the State of Tennessee. Appellant Sisk was legal counsel to the governor; appellant Benson was an extradition officer working under Sisk; appellant Taylor, a Tennessee highway patrolman, was part of the governor's security staff; appellant Thompson was a Democratic Party committeeman in Hamilton County, Tennessee. These four were charged with violating, and conspiring to violate, RICO by using their political influence to "sell" commutations of sentences and immunity from extradition.

After a suppression hearing and the usual flurry of motions, appellants' trial commenced on July 19, 1979 before Judge Charles G. Neese. On August 10, having suffered a heart attack,

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[1]Section 1962(c) of the codified Act provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c) (1976).

Judge Neese certified that due to his illness he was no longer able to preside at appellants' trial. Pursuant to Rule 25(a), Fed. R. Crim. P.[2] Circuit Judge Gilbert S. Merritt, Jr., was designated to continue the trial, presiding in Judge Neese's stead. On September 4, having questioned each juror to determine whether any juror bias had arisen in the course of the eventful and highly publicized prior proceedings, Judge Merritt explicitly found "manifest necessity" to declare a mistrial. He did so, citing three separate grounds. The first was the four-week break in the trial following Judge Neese's initial illness; Judge Merritt concluded after questioning the jurors that their recall of the evidence presented had diminished. Second was the publicity during the trial break concerning a purported jury-tampering attempt, in which appellant Sisk had allegedly been called by a person offering to secure for him a "friend" on the jury in exchange for $25,000. Third was Judge Merritt's conviction that Judge Neese had erroneously instructed the jury on the existence of a conspiracy among appellants - a preliminary finding which triggered applicaiton of the coconspirators' exception to the hearsay rule. These three sources of possible juror prejudice led Judge Merritt to conclude that the parties could not have received a fair trial before that jury; he therefore believed it was necessary to declare a mistrial, and that retrial of appellants consequently would not be barred by the Fifth Amendment.

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[2]The Rule provides that:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

II

All of the defendants below objected to the trial court's declaration of mistrial.[3] Thus this ruling, while it precluded all possibility of convictions which might have been upset on appeal, also prevented the appellants from exercising their "valued right to have [their] trial completed by a particular tribunal. . . ." *Wade* v. *Hunter,* 336 U.S. 684, 689 (1949). *Accord, Illinois* v. *Somerville,* 410 U.S. 458, 466 (1973); *United States* v. *Jorn,* 400 U.S. 470, 484 (1971) (plurality opinion of Harlan, J.). This "valued right . . . must in some cases be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter, supra,* 336 U.S. at 689.

We must decide whether in the present case this "valued right" was properly so subordinated. There are no judicial per se rules for striking the balance of these personal and public interests; each case must turn on its facts. *See United States* v. *Jorn, supra,* 400 U.S. at 480 (opinion of Harlan, J.); *Downum* v. *United States,* 372 U.S. 734, 737 (1963); *Wade* v. *Hunter, supra,* 336 U.S. at 691; *United States* v. *Perez,* 22 U.S. 256, 256 (9 Wheat. 580) (1824). *See also* Holleman, *Mistrials and the Double Jeopardy Clause,* 14 Ga. L. Rev. 45, 78 (1979).

Justice Story described a balance tilted toward the public's interest as one of "manifest necessity" for declaring a mistrial:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion,

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[3]Appellant Sisk had moved for a mistrial and had apparently been joined in that motion by appellant Thompson. Sisk withdrew his motion later in the trial. The government, for its part, declared that, while a mistrial might properly be declared, it was ready and willing to proceed before the first jury empaneled.

> taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Perez, supra, 22 U.S. at 256 (9 Wheat. at 580).

"Manifest necessity" has become a term of art. It is a descriptive phrase which has acquired its own connotations; it cannot be read literally, for rarely will it be "necessary," in any everyday sense, for a trial judge to declare a mistrial. *See Arizona* v. *Washington,* 434 U.S. 497, 506 (1978). The necessity spoken of reflects a trial judge's estimate of the fairness to both sides of continuing a trial. Normally, courts will accord great deference to this estimate:

> [Trial judges] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.

Perez, supra, 22 U.S. at 256 (9 Wheat. at 580).

But here, as in all cases, discretion does not equal license; the Fifth Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of "necessary" mistrials were in fact to go unreviewed.

The Supreme Court has repeatedly tried to develop rules defining the reach of the Double Jeopardy Clause following a declaration of mistrial over a defendant's objection. *Gori* v.

United States, 367 U.S. 364, 369 (1961) implies that *sua sponte* declarations of mistrials will not bar subsequent retrials, "where it clearly appears that a mistrial has been granted in the sole interest of the defendant. . . ." *But see id.* at 370 (Douglas, J., dissenting).

"Sole interest of the defendant" is a concept that defies definition; in *Arizona* v. *Washington, supra,* the Court attempted to provide sharper guidelines for the review of mistrial declarations. There is, according to the Court, a "spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny. . . ."[4] *Id.* at 510. At one end of this spectrum are those cases in which the basis for the mistrial is the unavailability of critical prosecution evidence, or in which the state's superior resources are possibly being used to harass a defendant with successive trials. At this end of the spectrum, the "strictest scrutiny" is appropriate when a second prosecution is attempted. *Id.* at 508-09.

The other extreme is the case of the "classic" mistrial - declared when the trial judge believes the jury is unable to agree on a verdict. It is a commonplace in our legal system that a trial judge may discharge a genuinely deadlocked jury and require defendants to stand trial again. Because it is the trial judge who has heard and observed the jurors in such cases, appellate courts should and do normally defer to a trial judge's determination that a jury cannot reach a fair verdict.

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[4]The Court added in a footnote an obvious point—that "if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." 434 U.S. at 510 n. 28. This is not a case of such judicial action.

The present case lies in the latitudes between these poles. This case, like *Washington,*[5] resulted in a mistrial below because the trial judge wished to avoid submitting a case to biased jurors. Ordinarily a trial judge's estimate of juror prejudice is accorded "the highest degree of respect." *Washington, supra,* 434 U.S. at 511. But a mistrial is not "manifestly necessary" simply because the trial judge thinks juror prejudice has arisen; on appeal, the source of that prejudice must also be considered in deciding whether retrial of defendant is permissible under the Fifth Amendment.

When it is a trial judge's uninvited error which gives rise to juror prejudice, the judge may not discharge the jury and subject defendants to a second trial. A contrary rule would enable judges to perfect trial records in an attempt to ensure "irreversible" convictions when they so desired. Such a rule would also allow trial courts total freedom, through the purposeful commission of error, to harass defendants with multiple trials. Therefore Judge Merritt's conviction that his predecessor at appellants' trial had erroneously instructed the jury may not enter into our calculation of the necessity for Judge Merritt's declaration of mistrial.

In *Illinois* v. *Somerville,* 410 U.S. 458, 464 (1973), the Court, per Justice Rehnquist, stated that "[a] trial judge properly exercises this discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed due to an obvious procedural error in the trial." This language is not in conflict with a rule holding that a judge's own error does not give rise to manifest necessity for a mistrial declared over defendants' objections.

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[5] *Washington* dealt with a mistrial declared because of repeated improprieties by defense counsel during opening argument.

The "procedural" error in *Somerville* was a defect in the indictment - a defect which was discovered before any evidence had been presented. The defect was corrected and a new trial begun. The other examples of "obvious procedural errors" given by the Court in *Somerville* were a defendant's failure to make a proper plea[6] and empanelment on the petit jury of a person who had served on the grand jury which had indicted defendant.[7] A trial judge's supposedly improper instruction to the jury on the import of certain evidence is clearly not an "obvious procedural error" in the sense that these are; the errors cited in *Somerville* went to the validity *ab initio* of the first proceedings against the defendants. The errors were procedural in the sense that they destroyed the integrity of the legal process that we call a trial. Judge Neese's supposed error was not of that sort.

As we read it, Rule 25(a), F.R. Crim. P.,[8] permits the continuation under a substitute judge of a criminal trial that had been disrupted by the original judge's disability. It does not authorize the successor judge to sit in appellate review of his predecessor's actions. It is, therefore, irrelevant to appellants' double jeopardy claim that Judge Merritt did not himself commit the error which he pointed to in declaring a mistrial. The error may have been more manifest to Judge Merritt than to his predecessor as presiding judge, but that would not create necessity for a mistrial where no such necessity existed before.

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[6]*Lovato* v. *New Mexico*, 242 U.S. 199 (1916). The defendant in *Lovato* had demurred to the indictment and his demurrer was overruled. A jury was empaneled before the defendant had ever been arraigned for pleading.

[7]*Thompson* v. *United States*, 155 U.S. 271 (1894).

[8]*See* note 2 *supra*.

Judge Neese's challenged interim jury instruction may not enter into the determination of the manifest necessity for a declaration of mistrial below. Judge Merritt listed two other grounds for the declaration: the effect of the four-week delay occasioned by Judge Neese's illness, and the publicity surrounding a purported jury-tampering attempt during that delay. Judge Merritt did not find the delay itself determinative of the necessity of discharging the jury; more significant were the possibly prejudicial reports that reach several members of the jury while they were not under any judge's supervisory authority.

We have already noted that a trial judge's determination concerning potential juror prejudice is given the highest respect by appellate courts. The trial court's examination of the jurors showed that at least four jurors had been asked or teased about the attempt, well reported in the media, of an anonymous caller to provide one of appellants a "friend" on the jury.[9] While each of these jurors expressed confidence in his or her ability to weigh the evidence fairly, Judge Merritt understandably feared that these jurors might be inclined to vote for conviction in order to prove their honesty.

The necessity of discharging the jury is most manifest "when it is made to appear to the court that, . . . by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused." *Simmons* v. *United States,* 142 U.S. 148, 154 (1891). In the present case, outside influences brought to bear pending resump-

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[9]Judge Merritt excused one juror for reasons unrelated to jury-tampering publicity; at the time of his mistrial ruling, he was considering excusing at least two others. This would have left only three alternate jurors at a trial that was expected to continue at least three more weeks.

tion of the trial made it appear to the trial court that such prejudice has arisen; under these circumstances, retrial of the appellants is not barred by the Double Jeopardy Clause of the Fifth Amendment.

III

Appellants' second contention is that their actions were not within the purview of RICO, and that the trial court consequently erred in denying appellants' motions to dismiss the indictment against them. We have no jurisdiction to consider the propriety of the denial of these pretrial motions.

It is axiomatic that this Court's jurisdiction is defined by statute. *See e.g., Abney* v. *United States,* 431 U.S. 651, 656 (1977). The statute applicable here is 28 U.S.C. § 1291 (1976), which grants this Court "jurisdiction of appeals from all *final* decisions of the district courts of the United States . . ." (emphasis added). A pretrial order denying a defendant's motion to dismiss an indictment is not normally an appealable "final decision" under this section. *E.g., United States* v. *MacDonald,* 435 U.S. 850, 853-54 (1978) (barred pretrial appeal of denial of motion to dismiss indictment on 6th Amendment grounds); *Hoffa* v. *Gray,* 323 F.2d 178, 179 (6th Cir.), *cert. denied,* 375 U.S. 907 (1963).

The Supreme Court has held, however, that § 1291 does not limit appellant jurisdiction to review of "those final judgments which terminate an action...." *Cohen* v. *Beneficial Indus. Loan Corp.* 337 U.S. 541, 545 (1949). Under *Cohen,* an order on a pretrial motion is immediately reviewable if *(inter alia)* the trial court's decision involved rights which would be "lost, probably irreparably [,]" if review were deferred until after trial. *Id.* at 546.

A defendant's right not to be twice put in jeopardy for the same offense would be lost irreparably if the right could only be

raised following conviction at a second trial. Therefore denial of a pretrial motion to dismiss an indictment on double jeopardy grounds in considered "final," and hence immediately reviewable in the Court of Appeals. *Abney, supra,* 431 U.S. at 659.

Appellants argue that their attack on RICO's application is "part and parcel" of their double jeopardy claim and should now be considered by this Court. *Abney* forbids this; this Court does not have ancillary appellate jurisdiction to consider otherwise nonappealable questions which are raised simultaneously with double jeopardy claims. A contrary rule would encourage defendants' assertions of frivolous double jeopardy claims in circumvention of the finality requirement of § 1291. *Abney, supra,* 431 U.S. at 662-63.

The rationale for the final judgment rule - the prevention of piecemeal litigation and attendant delays - is especially cogent in criminal cases. *MacDonald, supra,* 435 U.S. at 854; *Di Bella* v. *United States,* 369 U.S. 121, 126 (1962). For this reason we do not believe that the district court's denial of appellants' motions to dismiss the indictment for failure to state an offense under RICO could itself be considered appealable under any exception to the final judgment rule. Appellants' motions do raise a purely legal question of statutory construction which is as well within our range of competence as within the district court's. It is therefore tempting to consider this question, for if it is answered as appellants urge, this litigation would be ended. In the long run, however, the right of criminal defendants to be speedily tried would be impaired if we were to adopt the practice of rendering, following interlocutory appeals, what would in effect be advisory opinions on the construction of penal statutes. This is one of those difficult cases in which, to serve the purposes of the final judgment rule, this Court must maintain the rule even though its individual applications require us to look beyond the plight of individual litigants. *Cf. MacDonald, supra,* 435 U.S. at 850 ("Allowing an exception to the rule against pretrial ap-

peals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause.").

Finally, it is irrelevant to any question of this Court's jurisdiction that both appellants and appellees have requested our interpretation of RICO. The parties to litigation cannot create appellate jurisdiction where none exists. *United States* v. *Florian,* 312 U.S. 656 (194) (per curiam), *reversing* 114 F.2d 990, 993 (7th Cir. 1940); *Clark* v. *Taylor,* 163 F.2d 940, 942-43 (2d Cir. 1947).

IV

The district court's denial of apellants' motions to dismiss the indictment on double jeopardy grounds is affirmed. Lacking jurisdiction to consider it, we express no opinion on the district court's refusal to dismiss the indictment for failure to state an offense under RICO.

No costs are taxed. Each party shall bear its own costs on appeal.

APPENDIX B

No. 79-5369

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee

v.

Thomas Edward Sisk, Charles Benson, Jr.,
Charles Frederick "Fred" Taylor, and
William Aubrey Thompson,
Defendants-Appellants.

ORDER
(Filed October 7, 1980)

Before: LIVELY and MARTIN, Circuit Judges, and PECK, Senior Circuit Judge.

Upon consideration of the petitions for rehearing filed herein by attorneys for defendants-appellants, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petitions for rehearing be and they hereby are denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk of Court

APPENDIX C

[ORDER FROM BENCH SETTING CASE FOR TRIAL RESUMPTION.]

Be it remembered that at 10:00 A. M. on the 30th day of August, 1979, the above-entitled matter came on to be heard before the Honorable Gilbert S. Merritt, Judge, at the United States Court House, Nashville, Tennessee.

Whereupon, the parties having announced ready the following proceedings were had, to wit:

PROCEEDINGS

* * *

(Transcript pp. 87-95)

THE COURT: What about any other factor or matter, anything that may not be involved with the case, a personal factor or your work? Is there any significant reason that you think you ought not to continue in the case, or worries you, gives you some concern about continuing in the case?

MR. HUDDLESTON: Nothing that I know of.

THE COURT: All right. Well, Mr. Huddleston, those are all the questions I have. You are through for the day. Are there any other questions?

(Negative gestures from the parties)

THE COURT: Thank you.

(Mr. Huddleston is led from the courtroom.)

THE COURT: Well, we are through sooner than I had anticipated. The Court in inclined to, without ruling at the present time if the case is continued, to excuse the juror from Mur-

freesboro for reasons that I think are apparent, but they are that the publicity in the paper about the Murfreesboro so-called jury-tampering affair mentioned the Murfreesboro juror and this juror is the only juror from Murfreesboro, and although the Court has no question about the situation, there is the possibility that anyone in that situation psychologically could feel that they can only do their duty and overcome any question by leaning a particular way in the case. For that reason, the Court would be inclined to excuse the juror. Now, here are the parties, I know one of the two of the parties that the defendants have made the motion. I will hear any of the other defendants on that subject, or the Government, if anyone wishes to be heard.

Now, on the other juror, which would mean that we would have to get an alternate because that's the next one. The other juror, who is Mrs. Baker, is the lady who was called by several people she thought were Metropolitan Police and then the F. B. I., and the defendants made a motion that she be excused. I believe, and I am not certain of this, I would have to look it up; I believe there is some legal authority, some Supreme Court cases on this question, and that those cases say that if there is any contact by the Government with a juror, that there should be very compelling reasons for retaining the juror. I'll take a look at those cases, and if the parties want to submit anything on that question, I would be very happy to see it.

MR. BRANSTETTER: We would take a look at that, if Your Honor please, for the law on it and in addition, I think the psychological affect of the F. B. I. calling this lady, saying, as she testified here, "now, don't you leave home", you can see, at least I thought I could see, how she was impressed with that power properly stated, and I just feel very strongly that the number of calls that she received and the overwhelming power that she felt that they had in having her sit right there at home would be such that it would be unfair for her to sit and hear the same, possibly same, not exact same individuals, but certainly those representatives from the Government that have in-

vestigated this case and will be testifying at the witness stand. We would urge on the Court to the extent that it is permissable, that she be excused.

THE COURT: Mr. Brown, either you or Mr. Cohen, I don't think Mr. Branstetter's question goes to anybody's integrity here, I think it's just concern—

MR. BROWN: No, I understand that. Your Honor, we will submit a case or two. My recollection of it is that if there is any contact, the Court is under an obligation to make an inquiry, and determine. That's why we filed the agent's 302 giving the extent of the contact. That particular agent, to my knowledge, has had no contact with the case before, is not a witness. Frankly, the thing is most unfortunate. We get a box and somebody listens to it and thinks they hear something and takes some kind of action. The contact seems to be so innocuous, and so far removed from any merits of this case that the Government's position at this point is that there seems to be no reasonable exclusion of the juror. That would get us down to three alternates, and we have got a long way to go, and I would hate like the dickens to come right up to the end and be one short.

THE COURT: All right, now I'll take that under consideration, and the parties can submit anything they have on the cases on that subject. Now, before we adjourn, I'll hear anything else you may have.

MR. BRANSTETTER: May it please the Court, of course at this point in time we have no way of knowing what Your Honor's decision is, of course, with reference to the method of procedure, but I would like to respectfully request the Court at this time to give us—I understand if we continue, we will probably be back on Tuesday, Monday being a holiday. We have been engaged, with some considerable staff, in researching the legislative history of Title IX, and particularly as it relates to the term "enterprise". Reading through the total Congressional Record in that respect, I have personally read a tremendous

amount, including various new articles that were written by Senator McClellen and various comments made by Senator Kennedy and others—Civil Liberties Union approach. We would like the opportunity of possibly some argument on that before we start the trial, if Your Honor would permit it, and we would also try to by tomorrow afternoon have for the Court some form of a brief, quotations, possibly attachments. We'll try to restrict those as much as possible to relate specifically to the enterprise question or the intent of Congress in that respect, as to might be applicable as to state governments, and subdivisions, and such.

THE COURT: Well, if you can file something on that subject by tomorrow, I should probably give the Government some reasonable period of time to respond. What I would contemplate doing is, once I had the Government's response, and I would hope they have some other people they could put on that subject if they think it's necessary, that we could delay argument on that until maybe later on in the next week, and we could take an afternoon and take that subject up. The problem is in scheduling. I don't mind hearing it, but I just would like to hear both sides at the same time. I think I can see your problem.

MR. BRANSTETTER: I would assume that they have much more staff than I have, and would be ready before I could be ready, Your Honor. The significance as I view it is this, that I think that the record will pursuade the Court, from what I have read, that "enterprise" does not cover the Governor's office, so I think it might save time, if in fact my assertions are reasonable accurate in that request. If we could, additionally, I might suggest this, if Your Honor please, we would like to have some—I am sure, as I understand it, where we left off, the Government was going to illegally pick up with tapes; play the tapes of the Memphis aspect of this case. We are, and will excessively object to those tapes on the basis of the motion we filed here on the wire tap statute, and I will anticipate some evidence possible be-

ing required of the Court for the Court to reach a legal determination as to whether or not our position may be right. I would just think that possibly the whole of the first day might be covered if the Government could be ready on the enterprise question and on the suppression question, particularly as in relation to tapes, that we do intend to begin presenting.

THE COURT: Mr. Brown, do you want to be heard on that?

MR. BROWN: Your Honor, we do propose to begin with certain recorded conversations. We'll probably start off with just some recorded conversations, and then go to a lot of video, but the motion to suppress, Mr. Branstetter's getting into the motion to suppress; again, the Government has two problems. One is the hearing, I understand that it has not yet been transcribed.

THE COURT: The motion to suppress, has there been a motion, other than the one that I know about which was filed recently, to suppress the tapes, and so on?

MR. BROWN: There was an earlier motion to suppress based on some search warrants. I am a little concerned, but almost aside from that is it has not been transcribed yet and because to start off some of the first tapes in the conversations with Mr. Weathers, which Judge Neese approved and made preliminary ruling on, and that preliminary ruling was based in effect on some of the testimony that occurred after that motion to suppress was considered. I think before Your Honor is going to be able to make a certificate to be able to proceed, I think that transcript has to be there. That is a concern.

THE COURT: We'll get that done, and I see what you mean. If you want to start with the tapes, I would have to, well, I think the court reporter can give me that over the weekend, and I could read it and be in a position to make a ruling on that.

MR. BROWN: Now the other problem, Your Honor, is on the motion suppressed. What we have an objection to, going in-

to the motion suppressed under the wire tapping statute itself. The motion has to be taken up before trial. Judge Neese, of course, denied Mr. Dugger's motion as not timely, and finally the Government submits it's simply not timely at this point to take the matter up, and we are ready to proceed with the tapes, and as far as the motion to suppress goes, it's not timely. The only objection I would think would be appropriate is to the relevancy or something of that nature.

THE COURT: That might very well be true completely if you didn't have this rule twenty-five, new judge situation. I have to certify that the trial can go forward with fairness to the parties, and that may impose an additional burden on the Court, and get me into questions that as the judge continues to preside wouldn't have to look into, but I understand what you are saying, and I will certainly consider that. I plan on spending this Labor Day weekend reading the transcript. I have it all and it runs about two thousand pages, and I have read six or seven hundred pages, but I'll read the rest of it over the weekend, including that transcript, and we'll come back, and I think the best thing to do, if it appears that the case will go on to continue, we should ask the jury to come in about 10:30 so we can take up any matters at 9:00 Tuesday that remains, but I would contemplate that over the—well in all eventuality that we ask the jury to come in Tuesday morning at 10:30 and we reconvene at 9:00 Tuesday morning.

MR. BROWN: Let me comment on one matter, Your Honor. At the hearing on the twenty-seventh, Your Honor requested that we file the transcripts of any wiretaps that concerns the other matter. We have here a copy of the whole investigative report prepared by the F. B. I. We submit that to the Court for the Court's inspection. Also, at the last hearing we requested access to the materials Mr. Branstetter filed under seal, and Mr. Branstetter said he had no objection, and I think the question is just the business of how we are going to be furnished those.

THE COURT: Yes, I think those are not in my chambers and I will ask my secretary to zerox copies of which we are talking about, and make them available to you.

MR BRANSTETTER: I believe I attached enough copies as I recall, Your Honor, of the material that we filed and asked to be placed under seal so that in the event the Court did distribute it, it would then be there.

THE COURT: If you will wait for a couple of hours, I will check it with my secretary and we'll try to get them.

MR. BROWN: We'll check tomorrow; thank you.

THE COURT: Anything else? If not, we will be in recess until Tuesday morning at 9:00.

APPENDIX D

United States District Court
For the Middle District of Tennessee
Nashville Division

No. 79-30054-NA-CR

United States of America

v.

Thomas Edward Sisk, Charles Benson, Jr.,
Charles Frederick "Fred" Taylor, William Aubrey Thompson

Opinion and Order On Defendants' Pleas of Double Jeopardy and Motion to Reconsider "Enterprise" Question
(Filed October 12, 1979)

I.

MERRITT, J. The Court declared a mistrial in this case over the defendants' objection. All of the defendants have filed pleas in bar for dismissal of the indictment on grounds that further prosecution and trial on the charges would "subject [them] for

the same offense to be twice put in jeopardy of life or limb" in violation of the fifth amendment. The pleas are denied for the reasons hereafter stated.

The Court has already stated orally on the record in detail its reasons for ordering a mistrial. (A copy of the transcript of the Court's earlier statements is attached at the end of this opinion.) The action was based on the Court's findings after voir dire of the members of the jury individually that the parties could not receive a fair trial before the existing jury (1) because of the one monthy intermission in the trial, during which there was extensive publicity concerning alleged efforts to bribe a member of this jury, allegations which some members of this jury saw or heard about, and (2) because the trial judge, in good faith but erroneously, told the jury in clear and unmistakable language that in this opinion the preponderance of the evidence so far introduced in the case demonstrated that the defendants were guilty of the conspiracy charged. Such an instruction constitutes serious error. See *United States* v. *Vinson and Thompson* (Nos. 78-5406 and 78-5412, 6th Cir. Sept. 27, 1979) and *United States* v. *Nickerson and Hall* (Nos. 78-5368 and 78-5392/3, 6th Cir. Sept. 28, 1979). Each defendant stated on the record that the second event constitutes reversible error, fatal to a fair trial, which could not be corrected or ameliorated by further voir dire or instructions to the jury. (See transcript of the hearing attached at the end of this opinion.)

Where a judge acting under Rule 25, Federal Rules of Criminal Procedure, finds under these circumstances that there is a *manifest necessity* for declaring a mistrial in a criminal case, a retrial of the defendants thereafter does not constitute a violation of the double jeopardy clause, as that clause has been uniformly interpreted by the Supreme Court since the early days of the republic. This court is not authorized, therefore, under the law to dismiss the case on double jeopardy grounds. See *United States* v. *Perez,* 22 U.S. 256 (9 Wheat. 579) (1824) (reprosecution not barred where "there is a manifest necessity" for mistrial); *Simmons* v. *United States,* 142 U.S. 148 (1891) (reprosecution not barred where jury discharged after forty hours of deliberation for inability to reach a verdict); *Thompson* v. *United States,* 155 U.S. 271 (1894) (reprosecution not barred where jury discharged because one juror had served on grand jury indicting defendant); *Wade* v. *Hunter,* 336 U.S. 684 (1949) (retrial not barred where military court-martial discharged due to tactical necessity in the field); *Gori* v. *United States,* 367 U.S. 364 (1961) (reprosecution not barred where trial judge discharged the jury because the prosecution asked improper questions concerning prior crimes); *United States* v. *Jorn,* 400 U.S. 470 (1971) (reprosecution barred where trial judge discharges the jury without a showing of manifest necessity and in clear abuse of his discretion); *Illinois* v. *Somerville,* 410 U.S. 458 (1973) (reprosecution not barred where, prior to taking of any evidence, mistrial granted due to presence of incurable defect in indictment); *United States* v. *Dinitz,* 424 U.S. 600 (1976) (reprosecution not precluded where mistrial ensued from good-faith expulsion by trial judge of defendant's counsel); *Arizona* v. *Washington,* 434 U.S. 497 (1978) (where record evinced manifest necessity for mistrial due to improper and pre-

judicia opening statement by defense counsel, reprosecution not prevented by failure of trial judge to make explicit manifest necessity finding). In all of these cases the Court held that retrial is not barred under the double jeopady clause where a mistrial is ordered for reasons of manifest necessity, even though the defendant objected or did not consent to the mistrial.

II.

In light of the ably presented motion of the defendant Sisk for reconsideration of the Court's earlier enterprise ruling, the Court has reconsidered this question in its own mind. The Court agrees that the question is not free from doubt and that it would be helpful to have appellate review of this issue prior to trial. Assuming on appeal from the Court's ruling on the defendant pleas of double jeopardy, an appeal to which the defendants appear to be entitled as a matter of right under *Abney* v. *United States,* 431 U.S. 651, 662 (1977), the appellate court will not be required also to address the enterprise issue. But in the interest of judicial economy, and the conservation of judicial, governmental and private resources, it may be possible for the appellate court to consider the issue.

Upon reconsideration of the issue, this Court is not persuaded that its construction of "enterprise" to include governmental agencies is in error. The Court agrees, for reasons stated in *United States* v. *Sutton* (No. 78-5134-5-6-7-8-9-41-2-3, 6th Cir. Sept. 4, 1979) that the RICO statute, as it finally emerged from Congress, is ambiguous in certain respects and, unless given a rational and fair construction, threatens to subsume many traditional state and federal criminal laws and preempt local administration and responsibility for criminal law enforcement. But this does not mean that the distinction between private and public agencies proposed by the defendants is a rational limiting

principle. I simply cannot find this distinction anywhere in the language or history of the statute. As previously explained, the language of the statute — both the definition of "enterprise" contained in the statute and the inclusion of bribery and the Hobbs Act as racketeering offenses — seems in conflict with such a construction.

In his motion for reconsideration, the defendant respectfully criticizes the court for failure to address in its earlier opinion one of defendant's most forceful arguments, the argument dealing with the forfeiture provisions of § 1963. But the fact that § 1963 contains certain criminal forfeiture provisions which do not apply to public funds and property does not mean, as defendant argues, that § 1962(c) exempts from criminal liability persons who use public rather than private agencies to conduct proscribed activities. The fact that a wrongdoer personally uses a legitimate business for illegal ends, whether the business is General Motors or Local Widgets, does not mean that a federal judge can impose a general forfeiture of the assets of that business anymore than he can forfeit the assets of the state. The forfeiture provisions should not be read so broadly. They should apply only to the specific "dirty" money or assets obtained, converted or invested. That would not include legitimate assets of a governmental or a private enterprise. Therefore, the forfeiture provisions of § 1963 are not inconsistent with the construction the court has given the statute.

Accordingly, the motion for reconsideration of the "enterprise" question is granted but for the reasons stated herein and in its earlier opinion, the Court adheres to the view that "enterprise" includes governmental agencies.

ENTER:

/s/ GILBERT S. MERRITT
United States Circuit Judge
sitting by designation

APPENDIX E

Amendment V - Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

18 United States Code §§ 1961 - 1968:

§ 1961. **Definitions**

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if, the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which

is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of

the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United Statse, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. **Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt

in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplies in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. **Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not

more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. **Civil remedies**

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brough by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. **Venue and process**

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United

States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so

designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

§ 1967. **Evidence**

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. **Civil investigative demand**

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) idenify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such persons at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so

withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand

to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.